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No. ____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Lawrence C.,

Petitioner

v.

Timothy L., Tina L. and Tyler J.,
a minor child,

Respondents

On Petition for a
Writ of Certiorari
to the Wyoming Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a natural father who has demonstrated a significant relationship with a minor child has a protected liberty interest in a relationship with his child under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Whether the Wyoming Statutes, as applied, violated the natural father's Due Process and Equal Protection rights under the Fourteenth Amendment because an irrebuttable presumption was created which denied him an opportunity to be heard in order to establish his paternity and continue a relationship with his child.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LAWRENCE C.,

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v.

TIMOTHY L. AND TINA L.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

The petitioner, Lawrence C., respectfully petitions for a writ of certiorari to review the judgment of the Wyoming Supreme Court.

OPINIONS BELOW

The opinion of the Wyoming Supreme Court is reported at Slip Opinion No. 93-135. The Opinion of the District Court is unreported.

JURISDICTION

The Wyoming Supreme Court entered its Decision on March 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution as applied to Wyoming Statutes § 14-2-101 to § 14-2-120. The Attorney General for the State of Wyoming is being served pursuant to 28 U.S.C. 2403 (6).

STATEMENT

Timothy L. (known as "L" in Opinion) and Tina L. (known as T.L. in Opinion) were married July 9, 1982. From April 1984 to September 1986, Timothy and Tina lived in England. Timothy had a vasectomy in September of 1986 and he held himself out as sterile. Also, in September

1986, Tina returned to Wyoming without Timothy. Lawrence C. (known as L.C. in Opinion) and Tina began an intimate relationship in November of 1986. Timothy returned to Wyoming in December of 1986 and temporarily stayed with Tina before returning to England for several more months. On September 11, 1987 Tina gave birth to Tyler (known as T.J. in Opinion). The minor child's conception was sometime in November/December 1986. (App. p. 4)

Tina and Timothy separated in April 1988 and remained separated until their divorce on January 9, 1989. After separating from Timothy, Tina moved in with Lawrence, where she and her children, including Tyler, lived together as a family. During the time Lawrence and Tina lived together, Lawrence held Tyler out to the world as his own child. (App. p. 4)

Lawrence and Tyler developed a warm, close, and loving parent-child relationship. They lived together on a daily basis with Lawrence providing meals, clothes, shelter, bathing,

discipline and social skills. Lawrence started teaching Tyler to count and his ABC's. Lawrence carried Tyler with him everywhere and they would often visit friends and relatives. His paternal grandparents, aunts, uncles, nieces and nephews all developed a relationship with Tyler.

The family relationship between Lawrence, Tina and Tyler continued until August of 1991 at which time Tina moved from Lawrence's dwelling. Tina refused all contact between Lawrence and Tyler after moving out.

PROCEEDINGS BELOW

Lawrence filed his first paternity action five days after Tyler was born, but he had to dismiss the action without prejudice because Tina and Timothy were still married and Lawrence had not established a relationship with Tyler. There was no standing and no rights had been created.

Lawrence filed a second Complaint for Paternity on April 30, 1992, Docket 130 Number

78, in the First Judicial District, State of Wyoming. Tina and Timothy had been separated since April 1988 and Lawrence had established a significant relationship with Tyler by then. Timothy and Tina filed a Motion to Dismiss on May 18, 1992 wherein they alleged that their divorce action precluded Lawrence from bringing any action and that he did not have standing.

The District Court granted Tina and Timothy's Motion to Dismiss on the basis that Lawrence did not having standing; that the divorce established paternity of Tyler which rebutted Lawrence's presumption of paternity; and that Timothy's presumption of paternity prevailed over Lawrence's presumption. (App. p. 15-19) Lawrence appealed to the Wyoming Supreme Court.

The Wyoming Supreme Court held that Lawrence had standing to bring a paternity action because he was a presumed father as set out in Wyoming Statute § 14-2-102(a)(iv), where he received the minor child into his home and openly held out the child as his natural son. (App. p. 7)

The Court also held that Timothy was a presumed father under § 14-2-102(a)(i), on the basis that the child was born during his marriage to Tina. (App. p. 11)

Since there were two presumed fathers, the Court examined § 14-2-102(b) which provides,

> A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two (2) or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. A presumption is rebutted by a court decree establishing paternity of the child by another man. (App. p. 9)

The Court held that Timothy's presumption of paternity had been established by clear and convincing evidence since he was married to Tina at the child's birth. The Court further found that there was a strong state policy in legitimacy and that "on the weightier considerations of policy and logic" Timothy's presumption controls and the presumption of

paternity in Lawrence is rebutted. (App. p. 11) In addition, the Court stated that Timothy and Tina's divorce decree rebutted Lawrence's presumption as a court decree establishing paternity of the child by another man. (App. p. 13)

All Due Process and Equal Protection Claims under the United States and Wyoming Constitutions were rejected by the Court in dismissing this case. (App. p. 13)

REASONS FOR GRANTING THE PETITION

The Wyoming Supreme Court generously refers to and quotes in this case for review Michael H. v. Gerald D., 491 U.S. 110, 109 C.St. 2333 (1989). The Wyoming Supreme Court incorporates a significant portion of Justice Scalia's opinion in Michael H. to effectively dismiss Lawrence's paternity case. The Court states in the conclusion of its opinion:

> This court has accepted and applied the decision of the United States Supreme Court in Michael H. v. Gerald D., 491

> U.S. 110, 109 C.St. 2333 (1989). JRW, 814 P.2d at 1262; R.S.C., 837 P.2d at 1093. LC (Lawrence) asserts that Michael H. supports his position because a majority of that Court, the concurring justice and the four dissenters, found that putative fathers do have due process rights. The plurality, which is the opinion of that Court, held that putative fathers do not have any procedural or substantive due process rights. Michael H., 491 U.S. at 121, 127, 109 S.Ct. at 2341, 2344. (App. p. 14)

Does the Wyoming Court interpret Michael H. as providing no Due Process rights to putative fathers?

Prior to the plurality decision in the Michael H. case, this Court recognized that a liberty interest was created in natural fathers when they had a significant custodial, personal or financial relationship with their child. This liberty interest received constitutional protection under Due Process and Equal Protection under the Fourteenth Amendment.

In fact, many of the states highest courts refuse to apply the plurality decision in

Michael H. Those states have looked to the preceding U. S. Supreme Court cases, the dissent in Michael H., and their own state constitutions to recognize this liberty interest and to protect that interest under Due Process and Equal Protection guarantees.

See In Re Adoption of B.G.S., 556 So2d 554, Supreme Court of Louisiana (1990); In the Interest of J.W.T., (Supreme Court of Texas, Slip Opinion No. D-1742, 1993); Matter of Raquel Marie X, 559 N.Y.S. 2d 855 at 860 (Court of Appeals - New York 1990) Adoption of Kersey S., 823 P.2d 126 at 1228 (California Supreme Court 1992).

In analyzing a case very similar to this case, the Texas Supreme Court stated:

> While Federal Jurisprudence may be useful in understanding our state constitutional guarantees, see Davenport, 834 S.W. 2d at 20, the help on the question presented here is limited by the sharp divisions present in the consideration of claims similar to Larry's in Michael H. (citation omitted). In the Interest of J.W.T., ___ SW.2d ___, Slip Opinion No. D-1742, p.

14-15, affirming 815 SW.2d 863. (1993)

The Wyoming Court finishes its conclusion by stating:

> It is irrelevant how one characterizes the holding in Michael H. because the State of Wyoming has provided putative fathers with due process rights by enacting the statutes found at §§ 14-2-101 to 120. Thus whatever due process rights a putative father has are found in those statutes. Since the presumption of paternity in LC (Lawrence) was rebutted pursuant to those statutes, LC (Lawrence) has received whatever due process he was entitled to under the statute. (App. p. 14)

It is evident that in applying state paternity statutes, the Wyoming Supreme Court disregarded Lawrences' due process rights. After granting Lawrence standing, the Wyoming Court created an irrebuttable presumption in Timothy, and granted a summary judgment dismissing the case with prejudice.

There are competing interests of overwhelming value at stake in this case. This natural father has developed ties to his child which

demand careful analysis. This case factual departs from Michael H. in that the mother and husband are no longer married and Lawrence developed a significant daily relationship with Tyler.

The Wyoming Supreme Court's decision is erroneous and the issues that it addresses are important.

In light of the fact that the opinion in Michael H. directly affects this case and that other state courts have routinely rejected its rationale, this court should grant certiorari.

I. PETITIONER'S STATUS AS A PRESUMED FATHER DUE TO HIS SUBSTANTIAL PARENTAL RELATIONSHIP WITH HIS CHILD ESTABLISHES A LIBERTY INTEREST PROTECTED UNDER THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment provides that no state shall deprive any person of life, liberty, or property without due process of law. The Court must first consider the nature of the liberty interest claim before it can

discuss the adequacy of Wyoming's statutory procedure for paternity. Lehr v. Robertson, 463 U.S. 248, 103 S.Ct 2985, 77 L.Ed. 2d 614 (1983).

This Court has declared it "plain beyond the need for multiple citation" that a biological parents' right to the "companionship, care, custody and management" of his children is a liberty interest far more important than any property right. Santosky v. Kramer, 455 U.S. 745, 758-759, 102 S.Ct 1388, 71 L.Ed. 2d 599, (1982).

The constitutionally protected liberty interest of an unwed father in his children was not legally recognized until the 1970's. In Stanley v. Illinois, 405 U.S. 645 at 651, 92 S.CT. 1208, 31 L.Ed. 2d 551, (1972), this Court established that interest by declaring that an unwed father's interest "in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."

In 1978, Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed. 2d 511, the natural father appealed a Georgia Supreme Court decision where he was not allowed to object to the adoption of his 11 year old illegitimate child. This Court affirmed the Georgia Court on the basis that the unwed father "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." Quilloin, Supra at 434 U.S. 256.

In 1983, this Court stated in Lehr v. Robertson, 463 U.S. 248 at 103 S.Ct 2985, 77 L.Ed. 2d 614 at 626:

> The difference between the developed parent-child relationship that was implicated in Stanley and Caban, and the potential relationship involved in Quilloin and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child." Caban, (citation omitted) his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." (citation omitted) But the mere

> existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children ... as well as from the fact of blood relationship." (citation omitted)

While all of these cases present different factual and legal circumstances, one central theme surfaces throughout. Where an unwed father has demonstrated a commitment to his child and has come forward to assume his responsibilities and obligations as far as he is able (and as far as the mother is willing) then this Court has found the rights that accompany those responsibilities constitutionally protected.

In this case before the Court, the natural mother and minor child moved in with Lawrence. He provided daily care for the child and provided financial support. His love and care for the child in his family home created a

bonding that requires constitutional protection.

II. THE WYOMING STATUTES, AS APPLIED, VIOLATE PETITIONERS PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

"[T]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Mattews v. Eldridge, 424 U.S. 319 at 333, 96 S. Ct. 893, 47 L. Ed 2d 18, (1976).

Before a person is deprived of a protected interest, he must be afforded some kind of hearing, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

This Court has identified three factors in examining due process: first, the private interest that will be affected by the official

action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The procedure employed by the Wyoming Court in denying a hearing for the natural father in light of these three factors requires the conclusion that those procedures do not satisfy constitutional standards. First, Lawrence has a liberty interest in his child. Second, the Wyoming Court dismissed this case at the threshold of standing.

The Wyoming Supreme Court held that the Order Dismissing the Case with Prejudice was pursuant to Rule 12 (b) of the Wyoming Rules of Civil Procedure, which provides:

> If, on a Motion Asserting the Defense numbered (6) to Dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the Motion shall be treated as one for summary judgment and disposed of a provided in Rule 56 ...

Did the Court dismiss Lawrences' petition because it failed to state a claim upon which relief can be granted?

Timothy and Tina never answered the paternity petition. The guardian ad litem never answered the petition nor did he ever investigate the circumstances. No interrogatories, depositions, blood tests, or other discovery was ever conducted because the case was dismissed at the hearing for standing. No evidentiary hearing was ever held.

The trial judge held that Lawrence did not have standing to bring his paternity action. The Wyoming Supreme Court found that Lawrence did have standing because he was a presumed

father within Wyoming Statute § 14-2-102 (a)(iv) wherein, "a man is presumed to be the natural father of a child if he receives a minor child into his home and openly holds out the child as his natural child".

The Court also found that Timothy was a presumed father under Wyoming Statute § 14-2-102 (a)(i) where he and the child's natural mother were married at the time of the birth.

The Court proceeded to Wyoming Statute § 14-2-102 (b) which provides "that if two or more presumptions conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls". In addition, this subsection provides that a presumption is rebutted by a court degree establishing paternity of the child by another man.

The Wyoming Court found that Timothy's presumption was by clear and convincing evidence because he was married at the time. The Court never looked at Lawrence's

presumption as clear and convincing even though a substantial number of Affidavits were filed supporting his presumption.

In citing Michael H., the Court restated a strong policy in legitimacy to ensure children born during wedlock will not be considered illegitimate. Therefore, the Court held that the presumption of paternity in Timothy was founded on the weightier considerations of policy and logic and that his presumption controls according to the Statute. Lawrence's presumption of paternity was rebutted and the case was dismissed.

The United States Supreme Court declared a similar presumption unconstitutional as depriving an unmarried father of his child without due process of law. Stanley v. Illinois, 405 u.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). In that case the court held that a state could not merely presume that unmarried fathers in general and petitioner in particular were unsuitable and neglectful

parents; rather, parental unfitness must be established on the basis of individualized proof.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. Stanley v. Illinois, 405 U.S. at 656-57, 92 S.Ct. at 1215, 31 L.Ed.2d at 561-62.

Under this analysis, an irrebuttable presumption was established where the presumed father is married at the time of the minor child's birth. Although Lawrence was a presumed father because he had cared for the child and held him out as his own, the Court held that the public policy of legitimacy was so strong that a hearing was not necessary.

This is in direct conflict with the Supreme Court of Massachusetts which allowed a putative father to rebut the presumption of a putative father who was married to the child's mother at the time of birth. C.C. v. A.B., 550 N.E.2d 365, at 372, (MASS 1990).

However, this presumption analysis conflicts directly with Wyoming Statute § 14-2-107 and prior case law wherein each man presumed to be the father under Wyoming Statute § 14-2-102 shall be given notice of the action and an opportunity to be heard. In fact, the Wyoming Supreme Court has held that the paternity statutes contain strict procedural requirements which require a mandatory and formal hearing before trial, mandatory blood tests upon request of a party, and mandatory recommendations for settlement. AEI v JDM, 758 P.2d 22 (1988).

III. THE WYOMING STATUTES, AS APPLIED, VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Wyoming Statute § 14-2-102(a) identifies four situations when a man is defined to be a presumed father. Timothy came within the first definition and Lawrence the last one. No where in the statutes does it imply that one presumption is preferred over another.

Wyoming Statute § 14-2-102(b) then states that when two presumptions conflict, then based upon "weightier considerations of policy and logic" one controls.

What logic? Timothy had a vasectomy and he held himself out as sterile prior to the conception of the child. Similarly, when Tina separated from Timothy in April 1988, she moved in with Lawrence and allowed him to raise Tyler as his own.

What policy? The Wyoming Legislature amended Wyoming Statute § 14-2-104(c), effective July 1, 1993 as follows:

> Any man alleging that he is the natural father of a child having a presumed father under W.S. 14-2-102 may, within six (6) months of the child's birth or on or before December 31, 1994, whichever is later, bring an action under this section to declare his paternity of the child and accordingly rebut the presumption of a father and child relationship between the child and the presumed father.

The Wyoming Legislature promulgates policy, and it was their policy that any man may rebut any presumption. The State may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. Reed v. Reed, 404 US 71, 76, 30 L Ed 2d 225, 92 S Ct 251 (1971).

Legitimacy is the strong state policy? The Wyoming Court had no trouble to rebut the presumption of paternity in a deceased husband in Vigil v. Tafoya, 600 P.2d 721 at 722, (Wyo. 1979). This Court also has held that family relationships deserving of constitutional protection extends to those outside of the

traditional marriage. "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." Stanley, Supra at 651. Quoting Glona v. American Guarantee Co., 391 US 73, 75-76 (1968).

Indeed other courts have held, that the marital family ending in divorce would allow a natural father to proceed with a paternity action in regards to a child born in that marriage. In re Melissa G, 261 CalR., 894, (CA 1989), a putative father was allowed to bring a paternity suit in regards to a child born into a marriage where that marriage had ended in divorce and where the putative father had a substantial relationship with his child. See also Matter of Raquel Marie X, 559 NYS2d 855 (Ct App 1990) Also CC v AB, 550 NE2d 365 at 375 (Mass 1990) and Michael KT v. Tina LT, 387 SE2d 866 (WVA 1989).

Here we have Timothy and Lawrence recognized as presumed fathers under Wyoming Statutes. But, the Wyoming Supreme Court dismisses

Lawrence's claim as a matter of law without any hearing, without any discovery, without any investigation by the Guardian ad Litem to determine the best interests of the child, without any blood tests.

There is no rational basis to treat Lawrence different from Timothy and therefore, Lawrences liberty interest was violated under the Equal Protection of the Fourteenth Amendment.

CONCLUSION

The Writ of Certiorari should be granted.

DATED this 13th day of July, 1994.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT, STATE OF WYOMING

October Term, A.D. 1993
March 15, 1994

LC, Appellant (Plaintiff), v. TL, L, and TJ, a Minor Child, Appellees (Defendants).	)	No. 93-135
v. LC, Appellee (Plaintiff).	)	No. 93-136

Appeal from the District Court of Laramie County:
The Honorable John T. Langdon, District Judge, Retired

Representing Appellant Cole:

Dennis M. Grant, Cheyenne, WY.

Representing Appellees Lear:

Franklin D. Bayless of Bayless & Slater,
Cheyenne, WY.

Before **MACY, C.J.**, and **THOMAS, CARDINE, GOLDEN,** and **TAYLOR, JJ.**

CARDINE, Justice.

Appellant ("LC") brought his action, No. 93-135, against TL, her ex-husband ("L"), and TJ, TL's child, to establish his paternity to the child. This district court concluded that LC lacked standing to bring the action and dismissed his complaint with prejudice. LC appeals that decision. In a cross-appeal, No. 93-136, L and TL appeal the district court's denial of attorney fees.

We affirm the district court in both appeals.

LC raises the following issues:

> Did the district court err in dismissing the appellant's complaint for paternity with prejudice?
>
> Is the case rendered moot because of the amendment of Wyoming Statute §14-2-104 (c)?
>
> Did the district court err in determining that the appellant had no standing to pursue paternity as a

presumed father pursuant to Wyoming Statute § 14-2-102 (a)(iv)?

Did the district court err in denying the appellant a hearing to establish paternity and thereby denying the appellant due process and equal protection under the United States and Wyoming Constitutions?

In their cross-appeal, L and TL present the following issue:

Whether the district court erred in failing to award attorney fees to [L] and [TL], appellants, as against [LC], appellee, based upon W.S. 14-2-114 authorizing a court to order reasonable fees of counsel in paternity proceedings and/or pursuant to Rule 11, Wyoming Rules of Civil Procedure authorizing a court to award attorney fees because the pleadings are not well grounded in fact or law and are interposed for an improper purpose.

Ostensibly, this case comes to us as a dismissal for lack of standing. However, the record does not reveal whether the action was dismissed under W.R.C.P. 12(b)(6) or 41. LC believes that the dismissal was under Rule 41. We do not agree. The dismissal could not have been pursuant to 41(a), since that applies only to voluntary dismissals. This clearly was not a voluntary dismissal.

Rule 41(b) applies where the plaintiff has failed to: prosecute his claim, comply with the rules of civil procedure, or show that he has a right to relief after he has presented his evidence in a trial before a judge without a jury, none of which is applicable in this case. This action, therefore, was not dismissed pursuant to Rule 41.

This case is properly characterized as a dismissal under W.R.C.P. 12(b)(6) because the district court dismissed based upon the parties' pleadings and memoranda with no fact finding or evidentiary hearing having been held. When a

motion to dismiss is determined upon matters outside of the pleadings, it is automatically converted to a summary judgment motion. See Stalkup v. State Dep't of Environmental Quality, 838 P.2d 705, 708-09 (Wyo. 1992); Landmark, Inc. v. Stockmen's Bank & Trust Co., 680 P.2d 471, 474-755 (Wyo. 1984). Here the district court considered matters outside of the pleadings and its decision, therefore, was a ruling under W.R.C.P. 56. Accordingly, we will use our well-established standard for summary judgment in our examination of this case.

FACTS

L and TL were married July 9, 1982. From April 1984 to February 1987, L, who was in the Air Force, was stationed in England. However, in September 1986, TL and their two sons returned to the United States. LC and TL began an intimate relationship in November 1986, during TL and L' marriage. L had a vasectomy in September of 1986. L returned to Wyoming and

stayed with TL during December of 1986 and January 1987. On September 11, 1987 TL gave birth to TJ.

TL and L separated in April 1988 and remained separated until their divorce. After separating from L, TL moved into an apartment with LC, where she and her children, including TJ, lived. L and TL were divorced on January 9, 1989, and L was ordered to pay child support for TJ. During the time LC and TL lived together, LC held TJ out to the world as his own child by: letting TJ and TL live in his apartment rent free, supervising and caring for TJ, providing clothing and other items, and introducing TJ as his son to other persons.

On September 16, 1987, five days after the birth of TJ, LC filed a paternity action. The action was subsequently dismissed without prejudice. After his break-up with TL, LC filed this action on April 30, 1992. LC claimed he was a presumed father by virtue of his having held TJ out to the world as his own son and,

therefore, he was entitled to blood and DNA tests to prove his claim. The district court did not hold a evidentiary hearing; instead a hearing was held on a motion to dismiss by TL and L. The court granted the motion and ordered LC's complaint be dismissed with prejudice. In Case No. 93-135, LC has appealed that decision to this court.

L and TL moved for attorney fees under W.R.C.P. 11 and W.S. 14-2-114 (Cum.Supp. 1993) because, they claimed, LC's suit was baseless. The district court denied their motion. They appeal that decision in Case No. 93-136.

STANDARD OF REVIEW

Our standard for the review of a summary judgment has been articulated by this court many times:

> Summary judgment is proper when no genuine issues of material fact exist and the prevailing party is entitled to judgment as a matter of law. Baros v. Wells, 780 P.2d

341 (Wyo. 1989); Farr v. Link, 746 P.2d 431 (Wyo. 1987).

> "We review a summary judgment in the same light as the district court, using the same materials and following the same standards. We examine the record from the vantage point most favorable to the party opposing the motion, and we give that party the benefit of all favorable inferences which may fairly be drawn from the record. A material fact is one which, if proved, would have the effect of establishing or refuting as essential element of the cause of action or defense asserted by the parties."

Wagner v. First Wyoming Bank, N.A. Laramie, 784 P.2d 224, 226 (Wyo. 1989) (citations omitted).

Kilmer v. Citicorp Mortgage, Inc., 860 P.2d 1165, 1167 (Wyo. 1993) (quoting Husman, Inc. v. Triton Coal Co., 809 P.2d 796, 798-99 (Wyo. 1991), appeal after remand, 846 P.2d 664 (Wyo. 1993)).

DISCUSSION

I. CASE NO. 93-135

As a preliminary matter, we note that several of the paternity statutes located at W.S. 14-2-

101 to 14-2-120 were amended after this action had commenced. LC asserts that the amendment to W.S. 14-2-104(c) (Cum.Supp. 1993) confers standing on him, even though the amendment did not take effect until after the district court had entered its order. Since we conclude that LC had standing under the act before it was amended, we need not decide this question.

The issue of standing is not complex. At common law a putative father could not bring a paternity action. CSP v DDC, 842 P.2d 528, 531 (Wyo. 1992); State by Dep't of Family Servs. v. Jennings, 818 P.2d 1149, 1150 (Wyo. 1991). The statutory provisions contained in W.S. 14-2-101 to 14-2-120[1], the Wyoming Parentage Act, are the exclusive means for determining the paternity of a child and his natural father. CSP, at 531; AEI v. JDM, 758 P.2d 22, 23-4 (Wyo.1988). In A

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[1]LC raised retroactivity only in regards to W.S. 14-2-104(c) and its effect on his standing. Therefore any further reference to these statutes is to the version in force at the time LC filed his action on April 30, 1992.

v. X, Y, and Z, 641 P.2d 1222 (Wyo. 1982), we held that A had no standing to bring a paternity action because he was not a presumed father under any of the three possibilities set out in W.S. 14-2-102. Our prior cases, therefore, require a putative father, as a prerequisite to standing, to show that he has a presumption under one of the three possibilities contained in § 14-2-102. X, Y, and Z,, at 1223.

Assuming that the facts alleged by LC are true, W.S. 14-2-102(a)(iv) (1986) and our prior case law, clearly give LC standing to bring this action. W.S. 14-2-102(a)(iv) provides:

> (a) A man is presumed to be the natural father of a child if:
>
> *****
>
> (iv) While the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.

We look at the facts alleged in the light most favorable to the party who opposed summary

judgment. LC has alleged sufficient facts in his pleadings and through the affidavits of other persons to support his contention that he received TJ into his home and held the child out as his own. Therefore, we must conclude that LC is entitled to the presumption provided in W.S. 14-2-102(a)(iv). Furthermore, W.S. 14-2-104(b) (1986) provides that:

> [a]ny interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under W.S. 14-2-102(a)(iv).

Since LC is a presumed father of TJ, he has standing to maintain this action. See A v. X, Y, ad Z, 641 P.2d at 1223.

Our finding that LC has standing does not end our inquiry. The district court based its dismissal on two alternative grounds contained in W.S. 14-2-102(b) (1986). The district provided in its order, the following:

> 4. It is not disputed that the Defendants, [L and TL] were married at the time [TJ] was conceived and born to [TL]. When the Defendants were divorced by this Court, on 9 January, 1989, under Docket 117, Number 53[,][TJ] was determined by the divorce action to be a child of the marriage. Any presumption of the paternity of the child raised by [LC] is rebutted by W.S. § 14-2-102(b): "A presumption is rebutted by Court decree establishing paternity of the child by another man."
>
> 5. If the Court were to rely solely upon the presumption of paternity of the child in [L], as set out in § 14-2-102(a)(i), as against the presumption sought by [LC], the Court must also find that [L] is the father of [TJ], because the presumption which is "founded on the weightier considerations of policy and logic controls," § 14-2-102(b). ***
>
> 6. Under either of the alternatives set out above, [LC] lacks standing to bring this action, and the matter should be dismissed with prejudice.

While the district court's stated reason for dismissal was lack of standing, it is clear from the order that the court relied upon W.S. 14-2-102(b) as a basis of its decision. Standing "focuses upon whether a litigant is properly situated to assert an issue of judicial *** determination." Schulthess v. Carollo, 832 P.2d

552,556-57 (Wyo. 1992). As we have already noted, appellant had standing to bring a paternity action and was entitled to a presumption. Section 102(b), however, provides for a rebuttal of that presumption and for the resolution of conflicting presumptions and thus goes to the merits of appellant's claim. Regardless of how the district court may have framed its decision, we agree that § 14-2-102(b) is determinative of LC's claim.

In construing a statute, we look at the language of the statute to determine if it is ambiguous. If the statute is "vague or uncertain and subject to varying interpretations," it is ambiguous. Parker Land & Cattle Co. v. Wyoming Game & Fish Comm'n, 845 P.2d 1040, 1043 (Wyo. 1993). When a statute is ambiguous, we will resort to our rules of statutory construction. Id, at 1044. If, however, the statute is unambiguous, we will not resort to the rules of statutory construction; instead we will apply the plain meaning of

language contained in the statute. Id, at 1043.

Wyoming Statute 14-2-102(b) provided:

> A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two (2) or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. A presumption is rebutted by a court decree establishing paternity of the child by another man.

LC asserts that the district court misapplied this statute. He insists that the language of § 14-2-102(b) requires an evidentiary hearing, which would include blood and DNA tests. LC argues that the phrases "an appropriate action," "by clear and convincing evidence" and "on the facts" mandate this conclusion.

We find the statute to be plain and unambiguous, and we reject LC's interpretation. The word "action" has a well-defined meaning in law. "An action is a legal demand of one's rights in a court of justice." 1A C.J.S.

Actions § 2 (1985); Elmo v. James, 282 S.W. 835 (Tex.Civ.App. 1926). Thus § 14-2-102(b) is referring to an "appropriate legal demand of one's rights," not to a hearing. The legislature knows how to write a hearing requirement into a statute. See W.S. 14-2-312 (Cum.Supp. 1992) (hearing required before parent-child relationship can be terminated). Section 102(b) plainly means that when an appropriate action has been brought, a presumption can be rebutted by clear and convincing evidence.

Nor is the phrase "on the facts" a requirement for a hearing. "[On the facts" simply means based on the facts in the record at the time the ruling is made. For example, if the proceeding is a summary judgment motion, then the facts would be those derived form the pleadings and supporting or opposing memoranda. On the other hand, if a hearing was held, then the facts would include those adduced at the hearing. This portion of § 102 (b) is a

mechanism by which the court can resolve conflicting presumptions, and nothing in its language dictates that a blood or DNA test is a prerequisite to determining which presumption is "founded on the weightier considerations of policy and logic."

The district court held that even if LC had a presumption under § 14-2-102(a)(iv), the presumption of paternity in L was "founded on the weightier considerations of policy and logic." The district court determined that the State has an interest in protecting and preserving the family unit and that TJ has a right to legitimacy. LC asserts that the district court's reasoning is no longer valid because L and TL are divorced. Since they are divorced, LC argues, the State cannot possibly have any interest in preserving the family unit because it no longer exists.

The legislature in W.S. 14-2-102(b) has established a procedure for how and when a presumption can be rebutted. A presumption can

only be rebutted by clear and convincing evidence. AEI v. JDM, 758 P.2d 22, 24 (Wyo. 1988). The presumption of L's paternity of TJ is found in W.S. 14-2-102(a)(i) (1986):

> (a) A man is presumed to be the natural father of a child if:
>
> > (i) He and the child's natural mother are or have been married to each other and the child is born during the marriage ***.

The presumption of paternity in L has been established by clear and convincing evidence--it is undisputed that TJ was born during L and TL's marriage.

The legislature has also provided in § 102(b) the standard by which two conflicting presumptions are to be resolved. The presumption founded on the "weightier considerations of policy and logic controls." This court has long recognized the strong state policy in legitimacy, which is difficult to overcome.

> [W]e note there is a strong policy against bastardy. Michael H. v. Gerald D., 491 U.S.

110, 109 S.Ct. 2333, 105 L.Ed.2d 91, reh'g denied, 492 U.S. 937, 110 S.Ct. 22, 106 L.Ed.2d 634 (1989). In support of that policy, the Wyoming Legislature has enacted stringent provisions that tend to insure children born during wedlock will not be considered illegitimate. That presumption of paternity is sufficiently strong in certain instances to override even the fact of biological parenthood.

Matter of Adoption of R.S.C., 837 P.2d 1089, 1093 (Wyo. 1992). The presumption of legitimacy is one of the strongest in law. Matter of Paternity of JRW, 814 P.2d 1256, 1260 (Wyo. 1991).

Recently we restated the rationale for this policy:

> We cited Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91, reh'g denied, 492 U.S. 937, 1002 S.Ct. 22, 106 L.Ed.2d 634 (1989), and we

concluded that the presumption of legitimacy is actually a substantive rule of law based on an overriding social policy derived from the relationship of a presumed father and the child at the time of birth. We said, categorically:

> Apply the reasoning in Michael H. to this case, if we grant the appellant the right to compel genetic testing, we effectively deny the children's protected interests in having their legitimacy presumed under the Act. The balance between the children's protected right not to be "bastardiz[ed]" outweighs the father's interest in ascertaining paternity more than two years after acknowledging the same.

JRW, 814 P.2d at 1262 (citations omitted).

Livingston v. Vanderiet, 861 P.2d 549, 552 (Wyo. 1993). See also Peters v. Campbell, 80 Wyo. 492, 505, 345 P.2d 234, 238-39 (Wyo. 1959).

We hold that the presumption of paternity in L is founded on the weightier considerations of policy and logic. Therefor[illegible] L's presumption controls, and the presumption of paternity in LC is rebutted. This state has made a policy choice in favor of legitimacy. That choice is based on social considerations of the family unit and the child, which go beyond the marriage itself. The result in this case effectuates that policy.

The district court also relied upon the divorce decree as an alternative ground for its decision. Section 14-2-102(b) provides that "[a] presumption is rebutted by a court decree establishing paternity of the child by another man." The statute provides here an additional basis for the court's decision dismissing appellant's claim.

Finally, LC raises due process and equal protection claims. Essentially LC argues that because the marriage between TL and L is defunct, the State's interest in preserving legitimacy has evaporated. Therefore, equal protection and due process requires that his claim be heard.

In X, Y, and Z we rejected a gender-based equal protection challenge to the paternity statues by a man who was not a presumed father. Id, 641 P.2d at 1226. In fact, we held that those statutes would survive a strict scrutiny analysis. Id. LC has failed to present us with any cogent argument that would cause us to reconsider our decision. LC's equal protection challenge, therefore, is without merit and we reject it.

This court has accepted and applied the decision of the United States Supreme Court in Michael E. v. Gerald D., 491 U.S. 110, 109 C.St. 2333 (1989). JRW, 814 P.2d at 1262; R.S.C., 837 P.2d at 1093. LC asserts that Michael H.

supports his position because a majority of that Court, the concurring justice and the four dissenters, found that putative fathers do have due process rights. The plurality, which is the opinion of that Court, held that putative fathers do not have any procedural or substantive due process rights. Michael H. 491 U.S. at 121, 127, 109 S.Ct. at 2341, 2344. It is irrelevant how one characterizes the holding in Michael H. because the State of Wyoming has provided putative fathers with due process rights by enacting the statutes found in §§14-2-101 to -120. Thus whatever due process rights a putative father has are found in those statutes. Since the presumption of paternity in LC was rebutted pursuant to those statutes, LC has received whatever due process he was entitled to under the statute.

CONCLUSION

This state has a strong policy in favor of legitimacy that goes beyond the marriage. In

applying that policy, we conclude that the presumption in favor of L rebuts the presumption in LC because it is founded on the weightier considerations of policy and logic. We also find that the district court did not abuse its discretion when it denied attorney fees to L and TL. The district court's decision is affirmed in all respects.

STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

IN THE DISTRICT COURT

FIRST JUDICIAL DISTRICT

DOC. 130 NO. 78

LAWRENCE CHARLES COLE,

Plaintiff,

vs.

TINA LEAR, TIMOTHY LEAR, and TYLER JAMES LEAR, a minor child,

Defendants.

ORDER DISMISSING COMPLAINT

THIS MATTER, having come before the Court on the 17th day of December, 1992, upon Defendant's Motion to Dismiss, Plaintiff appearing, represented by his attorney, Dennis M. Grant, of Grant and Osborn, Defendant Tina Lear appearing, represented by her attorney, Lawrence P. Van Court, Defendant Timothy Lear appearing, represented by his attorney, Franklin D.

Bayless, and Philip P. Whynott, appearing as Guardian ad Litem of Tyler James Lear, and the Court having met with and heard argument of counsel, having reviewed the file herein, including the parties' respective Pleadings and Memoranda with supporting documents and affidavits, hereby makes is findings and enters its Orders:

THE COURT FINDS THAT:

1. An evidentiary hearing is not necessary in this matter. The parties are in agreement as to the applicable statutes and the basic facts of the case, derived through pleadings and prior hearings. Plaintiff may submit, as an offer of proof, any additional documentation or affidavits he may desire prior to entry of this Order.

2. Based upon the agreed facts raised in the parties' pleadings and memoranda, the Defendants allege that the Plaintiff lacks standing to bring this paternity action.

3. Plaintiff alleges that he is the natural father of Tyler James Lear. Through affidavits filed before the Court, he has attempted to raise the presumption that, pursuant to Wyoming Statutes § 14-2-102(a)(iv), he received the child into his home and openly held the child out as his natural child. He also alleges a right to bring an action pursuant to § 14-2-104(b) based on the presumption of his holding the child out as his own.

4. It is not disputed that the Defendants, Timothy Lear and Tina Lear, were married at the time Tyler James Lear was conceived and born to Tina Lear. When the Defendants were divorced by this Court, on 9 January, 1989, under Docket 117, Number 53. Tyler James Lear was determined by the divorce action to be a child of the marriage. Any presumption of the paternity of the child raised by Plaintiff is rebutted by W.S. § 14-2-102(b): "A presumption is rebutted by Court decree establishing paternity of the child by another man."

5. If the Court were to rely solely upon the presumption of paternity of the child in Timothy Lear, as set out in §14-2-102(a)(i), as against the presumption sought by the Plaintiff, the Court must also find that Timothy Lear is the father of Tyler James Lear, because the presumption which is "founded on the weightier considerations of policy and logic controls," § 14-2-102(b). At common law, a biological father could not bring an action for paternity. Even if Plaintiff was shown to be the biological father, he has only those rights conferred by statute, A v. X, Y, & Z, Wyo. 641 P2d 1222; Blanton v. Warn, Wyo. 444 P2d 325, 1968. The state has an interest in protecting and preserving the integrity of the family unit, and in protecting the best interests of the child. Tyler James Lear has right to legitimacy which the state is bound to protect, A v. X, Y, & Z, supra.

6. Under either of the alternatives set out above, the Plaintiff lacks standing to bring

this action, and the matter should be dismissed with prejudice.

NOW THEREFORE, IT IS ORDERED that the above-entitled action be, and the same hereby is dismissed with prejudice.

DONE this 15 day of April, 1993.